tion so voted. The better view permits ratification if the salaries are reasonable and not excessive. Majority stockholders are bound to act in good faith.[10] Courts use language to the effect that stockholders do not stand in the same fiduciary relation toward each other as directors do toward stockholders,[11] yet the modern rule is that powers granted a corporation, whether exercised by directors or stockholders, are to be exercised only in good faith and with a view to the benefit of the corporation.[12] Where the salaries so fixed may be found to be excessive and unreasonable, the minority stockholders are protected by their right to appeal to equity. The court will ascertain the reasonableness of the salary and, if necessary, give adequate relief.[13]

The principal case, adopting the view of the *Briggs* case,[14] accepts the minority or void rule. The rule, simply stated, is that a resolution of majority directors determining their own salaries as officers is void and of no legal effect. It cannot be ratified. Application of the void rule is not essential for the protection of minority stockholders from unfair contracts. The voidable rule gives thorough protection to the minority by putting upon the majority the burden of proving a fair contract.

P. A.

CRIMINAL LAW

Criminal Law — Embezzlement of Real Property

An attorney was indicted under the Ohio G.C. sec. 12467 on a charge of aiding, abetting and assisting the receiver[1] of a Building and Loan Company to embezzle certain parcels of real estate. A judgment sustaining a general demurrer and dismissing the indictment was

[10] *Kavanaugh* v. *Kavanaugh Knitting Co.*, 226 N. Y. 185, 123 N.E. 148 (1919); *Wheeler* v. *Abilene Nat. Bank Bldg. Co.*, 159 Fed. Rep. 391, 16 Law. Rep. Ann. N.S. 892 (1908); *Outwater* v. *Public Service Corp. of N. J.*, 103 N. J. Eq. 461, 143 Atl. 729 (1928); Berle and Means, The Modern Corporation and Private Property (1938) p. 241.

[11] *Russel* v. *Patterson Co.*, 232 Pa. 113, 81 Atl. 136 (1911); *Sotter* v. *Coatesville Boiler Works*, 257 Pa. 411, 101 Atl. 744 (1917); *Bates Street Shirt Co.* v. *Waite*, (*supra*, note 8).

[12] *Robotham* v. *Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842 (1902); A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 Harv. L. Rev. 1049 (1931).

[13] *Miner* v. *Belle Isle Ice Co.*, 93 Mich. 97, 53 N.W. 218 (1892); see annotation in 27 A.L.R. 300.

[14] Note 2 (*supra*).

[1] Both the receiver and the attorney were indicted in the court below under the false pretense statute, Ohio G.C., sec. 13104, as well as the embezzlement statute, G.C., sec. 12467. The aider and abettor counts under the false pretense statute were held properly dismissed but only because of an insufficient allegation of necessary elements and a consequent failure to charge the offense.

affirmed on the ground that real property is not subject to embezzlement.[2] *State* v. *Clark*, 60 Ohio App. 367, 21 N.E. (2d) 484, 14 Ohio Op. 369 (1938).

The evidence before the grand jury tended to indicate that by elaborate manipulations involving the services of defendant as attorney, the receiver passed title to the properties through dummy purchasers to the real purchasers. The common pleas court authorized the sales for Loan Company deposits, on the sworn statement of the receiver. It was charged that, in fact, the real purchaser paid in cash about one-third more than the value of the deposits accounted for by the receiver.

The embezzlement statute, Ohio G.C. sec. 12467, reads as follows: "Whoever, being . . . receiver . . . embezzles, or converts to his own use, fraudulently takes or makes away with, or secrets with intent to embezzle or convert to his own use, *anything of value* which shall come into his possession by virtue of his election, appointment, or employment . . . shall be imprisoned . . . or fined . . . or both."

"Anything of value" is defined for the entire Part Fourth (Penal) of the General Code in sec. 12369, to include "money, bills, bonds, or notes issued by lawful authority and intended to pass and circulate as money, goods and chattels, promissory notes, bills of exchange, orders, drafts, warrants, checks, or bonds given for payment of money or other property, rights in action and things which savor of the realty and are at the time they are taken, a part of the freehold, whether they be of the substance or produce thereof or affixed thereto, although there may be no interval between the severing and taking away, and *every other thing of value*."

Relying on the doctrine of *ejusdem generis* the court said that real estate itself was not included in the term "anything of value" as it is used in Ohio G.C. sec. 12467, *i.e.*, that only articles *removable from* the real estate were intended. The prosecutor relied on the case of *State* v. *Toney*, 81 Ohio St. 130, 90 N.E. 142, 18 Ann. Cas. 395 (1909) which held that the title to real estate could be the subject of obtaining property by false pretenses. The false pretense statute, now Ohio G.C. sec. 13104, also contains the phrase, "anything of value": "Whoever by false pretenses . . . obtains *anything of value* . . . shall be imprisoned . . . or fined . . . or both." (Italics added in each instance.)

[2] A second appeal, under a new indictment, from an order overruling defendant's motion for a directed verdict was dismissed on the basis that no appeal lies from such an order in a criminal case. *State* v. *Clark*, 61 Ohio App. 156, 28 Ohio L. Abs. 339, 15 Ohio Op. 119, 22 N.E. (2d) 458 (1939).

The court in the principal case said that the *Toney* case was not controlling on the embezzlement counts. The opinion was interpreted as having been based entirely on the effect of a revision of the false pretense statute in 1880. The phrase "any money, goods, merchandise or effects whatsoever" had been replaced by "anything of value." This was regarded as a change of substance indicating an intention to enlarge the scope of the false pretense section so as to include real property.

In the light of this emphasis, it is interesting to trace the history of the embezzlement statute in Ohio. Apparently the first embezzlement statute of a general nature was passed in 1839.[3] It enumerated the subjects of embezzlement as "any money, goods, rights in action, or other valuable security or effects whatever." The same phrase was continued in the next general act passed in 1869.[4] In 1881 the phrase "anything of value" was substituted.[5] Thus, there had been, at the time of the *Toney* case, a very similar change in both statutes practically contemporaneous. Moreover, the change in the false pretense statute had been initiated by the commission on general revision while the change in the embezzlement statute was made by separate enactment. Indeed if the doctrine of construing legislative intent by the history of a statute is to be invoked, the reenactment of "anything of value" in the embezzlement statute in the general revision of 1910 and in the separate law of 1925[6] could be construed as ratifying the interpretation of the phrase adopted in the *Toney* case in 1909.

Both the *Toney* case and the principal case would seem to depend upon the statute which defines "anything of value."[7] The construction of that definition as including real property seems to be necessary to the decision in the *Toney* case. The prosecutor's chief argument in that case, according to his brief as summarized in the official report,[8] was on the meaning of the statutory definition. If the court had accepted the argument of Toney's attorney[9] that things which savored of the realty were included but that realty itself was not, a contrary decision would seem to have been required. The position and wording of the defining statute indicates that it is not intended merely to suggest additional items, but to cover the whole field.

It is to be noted that some of the verbs indicating the conduct con-

[3] 37 Ohio Laws 74, sec. 1.
[4] 66 Ohio Laws 29, sec. 1.
[5] 78 Ohio Laws 186.
[6] 111 Ohio Laws 101.
[7] Ohio G.C., sec. 12369 uses the word "includes" and it is possible to say that it means different things in different places on that account. The only statute mentioned in the syllabus of the *Toney* case was the false pretense statute.
[8] 81 Ohio St. 130, at 132.
[9] 81 Ohio St. 130, at 136.

demned by the Ohio embezzlement statute may, but need not, embrace physical movement of a physical thing. From this aspect it would seem that "anything of value" could include both asportable and non-asportable[10] property. The verbs "embezzle" and "convert" in the embezzlement statute are at least as broad[11] as the verb "obtain" in the false pretense statute from the point of view of the type of acts condemned. Broadly speaking the embezzlement statute is aimed at the wrongful exercise of dominion over property by persons in certain relationships resulting in economic loss; and, such dominion may, as a practical matter, be exercised without asportation.

It is difficult to see why the legislature should have intended to prescribe a different rule for embezzlement from that applicable to obtaining property by false pretenses.[12] Title to real property may be wrongfully but irrevocably transferred by a fiduciary to a *bona fide*[13]

[10] A credit not evidenced by any instrument can be embezzled. *Higbee* v. *State*, 74 Neb. 331, 104 N.W. 748 (1905). A recent Ohio conviction seems to have been sustained on the theory that a failure to account, by one in charge of the financial affairs of a company, is itself the substantive offense. *Young* v. *State*, 44 Ohio App. 1, 7, 184 N.E. 24 (1932).

[11] There is no provision covering Part Fourth of the Code comparable to G.C., sec. 10214 covering Part Third, which reads in part as follows: " . . . The rule of the common law that statutes in derogation thereof must be strictly construed has no application to such (Third) part; but this section shall not be so construed as to require a liberal construction of provisions affecting personal liberty . . . or of a penal nature." Of course a statute defining a crime is not to be extended by construction. *U. S.* v. *Wiltberger*, 5 Wheat. (18 U. S.) 76, 5 L. Ed. 37 (1820); *State* v. *Meyers*, 56 Ohio St. 340, 47 N.E. 138 (1897). Yet penal provisions are to be fairly construed according to the expressed legislative intent and mere verbal nicety or forced construction is not to be utilized to exonerate persons plainly within the terms of the statute. *Barker* v. *State*, 69 Ohio St. 68, 68 N.E. 575 (1903); *Conrad* v. *State*, 75 Ohio St. 52, 78 N.E. 957, 6 L.R.A. (N.S.) 1154 (1906); *State* v. *Vause*, 84 Ohio St. 207, 95 N.E. 742, Ann Cas. 1912C, 513 (1911). The rule that penal statutes must be strictly construed does not require a construction defeating the legislature's plain intent. *Wilson* v. *State*, 26 Ohio App. 7, 159 N.E. 585 (1928); *Donnelly* v. *U. S.*, 276 U.S. 505, 512, 48 Sup. Ct. 400, 72 L.Ed. 676 (1928). One Ohio *per curiam* opinion puts it this way: "Most of our antiquated technical precedents had their beginning in a period of English jurisprudence when more than two hundred crimes were capital. The hardships and severities of the law were such that it was as difficult for an innocent man to escape conviction as it now is for a guilty man to be convicted." *State* v. *Gross*, 91 Ohio St. 161, 110 N.E. 466 (1914). *Cf.* Snyder, *The Influence of Equity Principles in Embezzlement Prosecutions*, 30 Ill. L.Rev. 995 (1936).

[12] A distinction is possible. The embezzlement statute carries a heavier maximum penalty than the false pretense statute. G.C. sec. 13125 making the conveyance of land without title a criminal offense, might be intended to cover such a case, but this statute has never been applied to a receiver and could hardly be applied where the fiduciary actually holds legal or equitable title.

The receiver is an agent of the court and might be punished by contempt proceedings. G.C. sec. 12137. However, the maximum plenalty for contempt under G.C. sec. 12142 would not be at all comparable to that provided by the embezzlement statute.

G.C. sec. 11896 requiring receivers to give bond for the faithful performance of their duties would seem to give the same protection to interested parties who had been injured by the crime of false pretenses.

[13] It is quite possible that an escrow holder, if not a receiver, could enable another to pass good title under certain circumstances. See note, 3 O.S.L.J. 221 (1937) and cases

purchaser under circumstances which preclude the possibility of a prosecution for embezzlement of the proceeds—as, for example, where the entire purchase price, paid or to be paid for the property, has not come into the hands of the fiduciary. Such a state of facts is suggested by the principal case. Real property would seem to deserve the protection of the criminal law in such a case quite as much as other species of property. Is the culprit to go unpunished if the property is wrongfully sold and the fiduciary is judgment proof?[14]

Neither embezzlement nor obtaining property by false pretenses was a crime at common law.[15] The first English Act included only personalty[16] but that should have little bearing on our law, assuming that the Ohio statute was designed to relax the rigidity of the common law rule.

Although several cases outside of Ohio have held that real property may be the subject of obtaining property by false pretenses,[17] there seem to be only two cases on the embezzlement of real property in the English and American reports. Real property was held not subject to embezzlement in *Manning* v. *State*, 175 Ga. 875, 166 S.E. 658 (1932). In *People* v. *Roland*, 134 Cal. App. 675, 26 P. (2d) 517 (1933) the court reached the contrary conclusion. Neither case relies strongly on the particular statute involved. However, a doubt as to the value of the *Roland* case as a precedent may be raised because of the California statute,[18] which specifically mentions real property. The case is in accord, however, with a broad and practical conception of how a person entrusted with property acts to convert it.[19]

A reading of the opinion in the principal case leaves one with the

there cited. A very broad statute in Massachusetts making the recording of any instrument affecting the title of land conclusive evidence of the delivery of such instrument would seem to permit reliance on recorded title in many of such instances. Mass. Laws Ann. (1933) vol. 6, c. 183, sec. 5.

[14] In such a case, note that any recovery on the bond mentioned in footnote 12 would be against the bondsman and not against the guilty fiduciary.

[15] 2 Wharton's criminal Law (Twelfth Ed. by Ruppenthal, 1932) secs. 1258 and 1395, respectively.

[16] 33 Hen. 6, Ch. 1 (1455). By the English Larceny Act of 1861 the term "any property" was used to describe the subject of larceny. 24 and 25 Vict., Ch. 96 sec. 80. By the same act (sec. 1) property was defined to include both real and personal property. "Any property" is still used in the English Embezzlement Acts and therein still defined in substantially the same way. Larceny Act of 1916, 6 and 7 Geo. 5, Ch. 50 sec. 20 (iv) (a), sec. 21 and sec. 46.

[17] *Morse* v. *State*, 9 Ga. App. 424, 71 S.E. 699 (1911); *State* v. *Blake*, 36 Utah 605, 105 Pac. 910 (1909); *People* v. *Rabe*, 202 Cal. 409, 261 Pac. 303 (1927); *People* v. *Maddux*, 102 Cal. App. 169, 282 Pac. 996 (1929). *Contra: State* v. *Layman*, 8 Blackf. (Ind.) 330 (1846); *Luce* v. *State*, (Tex. Cr. App.) 224 S.W. 1095 (1920); *State* v. *Klinkenberg*, 76 Wash. 466, 136 Pac. 692, 49 L.R.A. (N.S.) 965, Ann. Cas. 1915D, 468 (1913). Of course the particular statute involved in each case substantially affects the problem.

[18] See note, 8 So. Calif. L. Rev. 44 (1934).

[19] See Snyder, *Word Magic and the Embezzlement of Real Property*, 28 Jour. Crim L. and Crim. 164 (1937). The author also criticizes the *Manning* case.

impression that the Court of Appeals would limit the doctrine of *State* v. *Toney* to the exact facts of that case. It is to be regretted that the court felt compelled to undertake the task of limitation. Conceding that this was a close case of statutory construction and recognizing that the principal case does not contradict the syllabus of the *Toney* case, it is submitted that the holding is not in harmony with the construction of the statute defining "anything of value" bearing the imprimatur of the Supreme Court, nor with the purpose and intent of the embezzlement statute. A. N. M.

Criminal Law — Factors to be Considered in Recommendation of Mercy

Defendant was convicted of murder in the first degree without a recommendation of mercy. Error was claimed in the trial court's charge to the jury on the recommendation of mercy and in its refusal to charge as requested by the defendant. The trial court answered a question propounded by the jury, as to whether or not they could consider "sociological matters and environment" in recommending or refusing to recommend mercy, by saying, "No, that has nothing to do with the case." The Supreme Court held that the jury's discretion was limited to the facts and circumstances of the case as disclosed by the evidence, and hence there was no error in the trial court's ruling.[1]

Ohio G.C. sec. 12400 provides that first degree murder "shall be punished by death unless the jury trying the accused recommend mercy . . . " The court in the principal case follows the rule of *Howell* v. *State*, holding that the jury is to be confined to the evidence in exercising its discretion to recommend or withhold mercy.[2] The majority opinion in that case is severely criticized by Judge Robinson in a strong dissenting opinion[3] which was based upon the absence of any indication in the statute of a legislative intent to control the discretion of the jury in any respect whatsoever.

Outside of Ohio the courts have held under similar statutes that the discretion of the jury in giving or withholding a recommendation of mercy is not confined or limited by any rule of law or by the evidence or testimony of the case.[4] The Georgia court has held that the discre-

[1] *State* v. *Caldwell*, 135 Ohio St. 424, 21 N.E. (2d) 343, 14 Ohio Op. 320 (1939).
[2] *Howell* v. *State*, 102 Ohio St. 411, 131 N.E. 76, 17 A.L.R. 1108 (1921).
[3] *Rehfeld* v. *State*, 102 Ohio St. 431, 131 N.E. 712 (1921); *Howell* v. *State*, 102 Ohio St. 411, at 424.
[4] *Inman* v. *State*, 72 Ga. 269 (1884); *State* v. *Mewhinney*, 43 Utah 135, 134 Pac. 632, Ann. Cas. 1916 C 532, L.R.A. 1916 D 590 (1913); *Cook* v. *State*, 46 Fla. 36, 35 So. 665 (1903); *Winston* v. *United States*, 172 U.S. 303, 43 L.Ed. 456, 19 Sup. Ct. 212 (1898); *State* v. *King*, 158 S.C. 251, 155 S.E. 409 (1903).